(84)

No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

BRIEF AMICI CURIAE ON BEHALF OF TELECOMMUNICATIONS RESEARCH AND ACTION CENTER, WEST VIRGINIA CITIZEN ACTION GROUP AND SAFE ENERGY COMMUNICATIONS COUNSEL

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SAFE ENERGY COMMUNICATIONS COUNCIL

STATEMENT OF INTEREST

Amici represent the interests of telephone and energy utility consumers who are entitled to exposure to as much information as possible on matters of public import, and whose participation as consumers in the marketplace for goods and services, and citizens in the marketplace of ideas, is only as meaningful as the quality and quantity of information available to them.*

The need for informed debate on matters relating to the service of regulated utilities has magnified considerably over the last decade. Energy cost is now a significant budget item for most American families, and has become a major public policy issue. Questions about the

*Amici have submitted to the Court letters from counsel for each of the parties consenting to the filing of this brief.

price and kind of fuel used by electrical and gas utilities have even become intertwined with fundamental foreign policy considerations. Environmental quality issues have created additional, and sometimes contradictory, pressures on the energy distribution system.

Even more dramatic has been the total restructuring of our nation's telephone system, and its impact on consumers. It is no exaggeration to state that there is mass confusion over current telephone service. Customer bills bear little resemblance to those of only a few months ago. Ill-understood new charges have been imposed. The separation between local and long distance service, the forced choice from among a new array of

competing long distance carriers,** and the dramatic change from leased consumer equipment to customer-owned telephones and wiring has stupefied the American public. Consumers desperately need information, both to make decisions in the newly competitive marketplace for telecommunications services, and to express informed opinions about the public policy issues arising from this telecommunications "revolution."***

Amici, whose specific interests are

**Large segments of the public have apparently misunderstood the requirement that they must now select from among several competing long distance carriers. Because so few (about 30%) have made these choices when first called upon to do so, the FCC only recently had to direct local telephone companies to assign such consumers to particular suppliers. Investigation of Access and Divestiture Related Tariffs, FCC 85-295 (June 12, 1985).

***In this new environment, local telephone companies are often in an adverse posture to other businesses seeking to offer similar or competing services. Thus, unique access to consumers on such regulatory issues affords a significant commercial advantage as well.

stated below, are concerned that the public must be able to receive diverse viewpoints on these and other increasingly controversial and important issues related to telephone and energy utility rates and services.

Telecommunications Research and Action Center (TRAC)(formerly known as National Citizens Committee for Broadcasting) is a non-profit organization of 10,000 individuals and organizations. TRAC has helped establish a national telephone "hotline", and published books and posters to assist telephone consumers to participate effectively in the marketplace for services. As a participant in the regulatory and legislative process, and as a consumer newsletter publisher, it also seeks to assist the public by advocating specific regulatory policies promoting maximal public participation in these decisions. TRAC brings an addi-

tional, unique perspective to this case, since it represents consumer interests not only in telephone utility rate and service matters, but also in issues related to insuring that broadcasting and other electronic mass media provide opportunities for opposing viewpoints on controversial issues of public importance. As discussed in the Argument below, TRAC and other amici believe that the "extra space" in utility bill envelopes and the broadcast spectrum are both "scarce" or limited resources for the dissemination of ideas. Amici believe that such resources should not be monopolized by a single entity, whether it be a regulated utility or a licensed broadcaster.

Safe Energy Communications Council (SECC) is a five year old non-profit coalition of environmental, energy and media organizations. SECC was established because vast one-sided public relations

and advertising expenditures by utility and other energy providers left an imbalance in information available to consumers on the economic and environmental impact of energy policies. SECC has attempted to insure that ratepayers not be forced to subsidize such public relations expenditures, and has employed the fairness doctrine to make sure that the public is exposed to opposing points of view in broadcast coverage of utility issues.

West Virginia Citizen Action Group (WVCAG) is a private non-profit corporation, organized in 1975 for the general purpose of research, education and advocacy on public policy issues affecting citizens of West Virginia. WVCAG has focused on electric utility rate and service issues throughout its existence, by intervening in rate cases before the West Virginia Public Service Commis-

sion, conducting educational programs for citizens on utility rate issues, and advocating policy changes regarding rates in legislative, administrative, and judicial forums.

WVCAG is particularly concerned with the use of utility bill inserts by utility companies to express only one side of issues of public import. In March 1982, Appalachian Power Company (APCO), which provides electric power to West Virginia, enclosed with its bills a pamphlet urging customers to lobby the U.S. Congress on pending legislation. WVCAG, in conjunction with the National and West Virginia Wildlife Federations, and the Coalition of American Electric Consumers, asked APCO for an opportunity to present, in the bill envelope, an opposing view. APCO refused, and WVCAG petitioned the West Virginia PSC for relief. The PSC dismissed the petition, claiming a lack of jurisdiction

under West Virginia law. The Supreme Court of Appeals of West Virginia recently reversed the PSC ruling, holding that the PSC may order a response within the bill envelope, consistent with both state law and the First Amendment. West Virginia Citizen Action Group, et al. v. Public Service Commission, No. 16512 (W.Va. May 30, 1985).

SUMMARY OF ARGUMENT

For many years, Pacific Gas and Electric (PG&E) unilaterally utilized otherwise unused, postage paid, space in its billing envelopes to propagandize its customers. It paid nothing for the exclusive use of the customer mailing list, or for postage.

The determination of the California Public Utilities Commission (PUC) that this extra space, not needed for invoices or other official purposes, is ratepayer

property is not at issue here. Nor is it disputed that the right to use the space has economic value. What has been challenged is the PUC's determination that ratepayers' interests are best served by permitting others, as well as PG&E, access to that space to present information on issues of interest to consumers.

This case is entirely different from Consolidated Edison v, Public Service Commission, 447 U.S. 530 (1980), where this Court invalidated a flat ban on all discussion of controversial issues in utility bill stuffers. No one, certainly not PG&E, has been restricted from speaking on any issue, at any time. Moreover, in Consolidated Edison, there was no finding as to the ownership of the extra space.

The PUC's decision here is firmly rooted in established First Amendment jurisprudence. Actions which promote the

free-flowing marketplace of ideas in our democracy contribute to the development of a better informed electorate. By insuring that this valuable and scarce ratepayer property is used to discuss contrasting views on issues of import, the PUC has advanced the First Amendment right of the public "to receive suitable access to social, political, esthetic and other ideas." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

PG&E wrongly places reliance on Miami Herald v. Tornillo, 418 U.S. 241 (1974) to contend that its constitutional rights have been impaired. The content, length and layout of PG&E's pamphlets, as well as its freedom to insert them in the utility bills, is unaffected by the PUC's decision. There is instead a close resemblance here to the fairness doctrine in broadcasting, which has been unanimously upheld by this Court. Red Lion, supra.

Nor is PG&E correct in claiming that it has been forced to endorse the views of its opponents. The PUC carefully insulated PG&E from being identified with bill inserts prepared by others, and PG&E remains free to include rebuttal messages of its own. This, combined with the fact that the extra space does not even belong to PG&E makes this case even more clear than that of PruneYard Shopping Center v. Robins, 447 U.S. 75 (1980), where similar arguments were rejected.

ARGUMENT

I. THE REQUIREMENT THAT UTILITIES MUST SHARE ACCESS TO THE EXTRA SPACE IN BILLING ENVELOPES, THE POSTAGE FOR WHICH IS PAID BY RATEPAYERS, PROMOTES THE FIRST AMENDMENT GOAL OF A ROBUST, UNINHIBITED, AND WIDE-OPEN MARKETPLACE OF IDEAS.

In this case, a state regulatory commission has precluded a single regulated entity from arrogating -- to its own exclusive use -- a limited, publicly owned, channel of communication. The ruling under review is correctly based on an established First Amendment objective: that the proper role of government is to promote a free-flowing marketplace of ideas, thereby enabling the citizenry to make better informed decisions on issues of public importance.

In similar circumstances, this Court unanimously upheld the constitutionality of the fairness doctrine of the Communications Act of 1934, as amended. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367

(1969). The fairness doctrine is based on the principle that because broadcasters have an exclusive government license to use a limited, or "scarce," means of communications for the benefit of the public, the licensing authority can properly require the presentation of contrasting viewpoints on controversial issues of public importance.

Here, the California Public Utilities Commission (PUC) ruled that Pacific Gas & Electric Co. (PG&E) may not monopolize access to the "extra space" in monthly bill envelopes, the postage for which is paid by ratepayers, not PG&E shareholders. The PUC held in a prior ruling[1] not disputed here, that the extra space is a valuable limited resource for the dissemination of ideas in which the ratepaying public holds an equitable

[1]Decision 93887. See PUC Motion to Dismiss at 8, A-33.

property interest. Unlike the situation in Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) (hereinafter "Con. Ed."), where this Court rejected a flat ban on use of the billing envelope for controversial messages, the PUC ruling in no way restricts the utility's rights to express its views. Rather, as in Red Lion, the PUC ruling insures that the public receives more, not less, information upon which to evaluate important questions of public policy.

Broadcasting, the subject of Red Lion, and the extra space in utility bill envelopes, the issue here, share a relevant characteristic. There is in both instances the danger of monopolization of a limited or scarce publicly owned means of communicating ideas. Just as only one person may use a particular broadcasting frequency at a given time, the extra space in the bill envelope is the only avenue

for reaching the universe of utility ratepayers through the mail without paying for postage. Prior to the PUC ruling, only PG&E was able to take advantage of the "free ride" in the bill envelope to disseminate its viewpoints. As a result, the ratepaying public received only PG&E's views, to the detriment of the "profound national commitment that debate on public issues should be uninhibited, robust and wide-open." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

A. The PUC's Action Promotes Speech And Therefore Is Consistent With The First Amendment

The First Amendment prohibits government from limiting speech on issues of public importance. However, the First Amendment does not prevent, but in fact encourages, government actions to promote more diverse speech, or to insure that public debate occurs in an orderly and

fair manner.[2] In furtherance of these goals, content-neutral rules to structure debate have been approved as advancing core objectives of the First Amendment. For example, this Court long ago endorsed steps to prevent the monopolization of ownership of various means of communication, stating: "It would be strange indeed...if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." Associated

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[2]See Con. Ed., 447 U.S. at 546 (Stevens, J., concurring).

Press v. U.S., 326 U.S. 1, 20 (1945).[3]

An obvious, well-accepted corollary is that, if a means of communication is necessarily limited, as are broadcast frequencies, those granted the exclusive right to use such means of communication may be expected to employ them to present contrasting viewpoints on controversial issues of public importance. This Court, unanimously upholding such a requirement as embodied in broadcasting's fairness doctrine, stated:

> It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee.

[3]In First National Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978), this Court invalidated a ban on certain types of corporate speech, but stated:

> If [the government's] arguments were supported by findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367.

Red Lion, supra, 395 U.S. at 390. See also CBS, Inc. v. FCC, 453 U.S. 367 (1981). As it has stated more recently, the "thrust of restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern." FCC v, League of Women Voters, 104 S. Ct. 3106, 3118 (1984).

In this case, the California PUC has acted to prevent the monopolization of a means of communication in which the ratepaying public has an equitable property interest. As with the fairness doctrine, the goal is to create an informed public by promoting, rather than inhibiting, speech. It is the public's right "to receive suitable access to social, political, esthetic, and other

ideas," Red Lion, supra, 395 U.S. at 390, which is thereby enhanced.[4]

B. The Extra Space in Billing Envelopes Is A Limited Scarce Resource Previously Monopolized By PG&E

The utility bill envelope is the only means of reaching all ratepayers through the mails free of postage charges. The postage for the entire envelope has already been paid by the ratepayers.

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[4]Protection for corporate political speech is not principally for the corporation or its owners, but is rooted in the benefits such expression has for creating a well-informed public, Con. Ed., 447 U.S. at 534. This Court has invariably reviewed restrictions on corporate speech in terms of their impact upon the marketplace of ideas. First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); id., at 810 (White, J., dissenting). Indeed, as noted in Bellotti, id. at 783, the analysis is the same even for corporate commercial speech:

> A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of information." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764 (1976). See Lindmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 95 (1977).

Thus, when the utility uses the envelope to address one side of a debate on public issues, it receives a "free ride" within the "extra space" in the envelope not used by the bill itself. Indeed, even if the utility agreed to pay a proportion of the postage, it would still receive a subsidy, to the extent that its cost would be less than a separate mailing.[5]

The California PUC ruling under review requires that access to this valuable resource not be monopolized by the utility. Absent the PUC ruling, ratepayers or their representatives who

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[5]As Justices Blackmun and Rehnquist noted in dissent in Con. Ed., 447 U.S. at 554:

> The Commission is obviously correct that the utility will obtain a partial free ride for its message even if the shareholders are charged with part of the mailing costs in addition to the costs attributable to the inserts. Consumers would still be forced to aid in the dissemination of the utility's distribution costs less than they otherwise would be.

hold views different from the utility company, and who wish to provide information to ratepayers, would be forced to pay the postage for separate mailings. Therefore, just as broadcasters must offer contrasting viewpoints over the "scarce" broadcast frequency under their control, so may a utility be required to allow alternative viewpoints to be presented in the bill envelope's extra space.

The fact that the California PUC has held that the "extra space" in the bill envelope is the equitable property of the ratepayers who have paid for the postage is a material distinction from Con. Ed.. In Con. Ed., ownership of the extra space in the envelope was not at issue. In that context, this Court declined to draw an analogy with broadcasting, stating that the flat ban there under review could not be justified on similar ground. It stated that "[n]o person can broadcast without a

license, whereas all persons are free to send correspondence to private homes through the mails." 447 U.S. at 530.

The California PUC has followed a different course than did its counterpart in New York. Focussing upon the contents of the billing envelope as ratepayer property, it did not restrict its use for political discussion, but rather, set out to insure that it was used optimally for that purpose.

Based upon the finding that the free or subsidized access to the extra space is a scarce commodity of value, the PUC's action does, in fact, resemble broadcast

regulation.[6] In these circumstances, the extra space in a bill envelope is a unique resource which cannot be substituted by general access to the mails. The ability to include a message in the bill envelope, regardless of who pays for the postage, brings special advantages which cannot be duplicated in a separate mailing. A utility bill envelope is not merely another piece of mail for most recipients. Virtually all ratepayers open and investigate at least superficially the contents of their utility bill envelope. Thus, those using the envelope to express their viewpoints are reaching a "captive

[6]The flat ban attempted in Con. Ed. ran afoul of the failure to account for the alternative of permitting more, rather than less, speech. Thus, the New York Public Service "Commission ha[d] not shown ... that the presence of bill inserts ... would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope." 447 U.S. at 530. Here, the California PUC has embraced the opportunity to direct that contrasting viewpoints be made available.

audience." A separate mailing may be treated as "junk mail" and thus, as PG&E concedes in its Brief, at 14, n.11, has a decreased probability of being read or even opened. See also PUC Motion to Dismiss at A-4, n.2.

The utility envelope is also the most efficient means of providing ratepayers with information on issues of particular concern to them.[7] The utility bill is sent to all ratepayers, and only to ratepayers. Without access to PG&E's customer list, those using a separate mailing can only guess which postal

[7]In similar circumstances, long-standing Securities and Exchange Commission regulations require corporate management to include statements by dissident shareholder groups in proxy materials mailed to shareholders. 17 C.F.R. §§240.14a-8, 240.14a-11. Just as management acts as a "fiduciary" for shareholders, and must therefore provide them with information from diverse sources, utilities are trustees or fiduciaries over the extra space in bill envelopes, which is the equitable property of ratepayers. Utilities may, therefore, be required to abide by obligations intended to provide ratepayers with contrasting viewpoints on issues of public importance.

addressees are in fact ratepayers, leading to underinclusive or overinclusive mailings.[8]

For these reasons, the utility bill envelope is a unique and valuable medium which cannot be duplicated by other methods. Only the bill envelope offers essentially free postage through the use of the "extra space" and only the bill envelope will reach and be opened by all ratepayers. Utilities should not be permitted to monopolize this valuable resource.

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[8]Not all postal addressees in a particular area are ratepayers to certain utilities. For example, many apartment and condominium dwellers do not pay for utility service directly. Indeed, absentee landlords who are ratepayers may live in different communities and could be reached by mail only through the utility bill mailing list. Therefore, use of the general mails to reach ratepayers is not a substitute for use of the extra space in the bill envelope.

II. THE RATIONALE AND HOLDING OF MIAMI HERALD v. TORNILLO DO NOT APPLY TO THIS CASE

PG&E argues that this Court's ruling in Miami Herald v. Tornillo, 418 U.S. 241 (1974), supports the position that the California PUC may not permit others to have access to the billing envelope. In Tornillo, this Court invalidated a Florida statute requiring that a newspaper which attacks a political candidate in its own pages must offer to print a reply. The Court ruled that a newspaper could not be compelled to print the views of another in its publication. However,the Tornillo analogy is misplaced.

PG&E is not being forced to include anything in the "publication" -- known as Progress -- which it has long inserted into the extra space of the bill envelope. It retains full editorial discretion over Progress. PG&E may say whatever it wishes, without limitation as to content

or length. In addition, this case resembles, and is governed by, Red Lion, not Tornillo. The extra space in the billing envelope, unlike a newspaper, but similar to a broadcast frequency, is a scarce and limited public resource properly subject to measures intended to insure that the public receives information on important public issues.

A. PG&E'S Ability To Say Or Print Whatever It Wishes In The Bill Envelope Has Not Been Infringed

In stark contrast to the Florida statute overruled in Tornillo, the PUC ruling in no way restricts the content, length or layout of stories or commentaries contained within PG&E's newsletter. The effect of this ruling is not to force PG&E to make particular statements. It can speak out on any issue or refrain from such speech as it sees fit, in complete accord with this Court's rulings in Con. Ed. and Tornillo.

Most significantly, the statute condemned in Tornillo imposed a requirement that publishers be compelled to print within their newspapers, at their own expense, statutorily mandated replies. In contrast, PG&E is here not being compelled to print anything; it need not give up any editorial space or bear the cost of printing of TURN's opinions. The design and effect of the PUC ruling is to require only that PG&E provide TURN with access to a small portion of the excess, ratepayer owned, unused space in the envelope. It is space which PG&E had previously appropriated, without authority, for its

own use, at no cost to the company.[9]

Tornillo invalidated a dictate that newspapers modify their internal editorial processes. Thus, it was held that the relevant "statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." 418 U.S. at 258. There is no such intrusion into Progress' editorial processes. Progress' editors remain absolutely free to choose what material is included in, or deleted from, the paper. Therefore, the factors which led to the

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[9]PG&E also contends that the PUC ruling infringes upon its right to free speech, because the ruling would allegedly prevent it from inserting its newsletter into the bill envelope during months designated for TURN's access. This claim is without merit. Nothing the PUC has done precludes PG&E from including Progress or anything else in the bill envelope, even in those months during which TURN has been granted access. See TURN, et al. Motion to Dismiss, at 7-8. Even assuming that there may times when Progress may not fit into the extra space, PG&E would, at most, be forced to pay the extra postage necessary to add its material into the envelope, rather than take a "free ride" in the extra space paid for by ratepayers.

Tornillo ruling simply are not present here.

B. The Proper Analogy Is To Broadcasting, Not Newspapers

Tornillo is irrelevant to this case not only because there are no restrictions on PG&E's editorial discretion, but also because newspapers and the print media may not be properly analogized to the extra space in bill envelopes. Rather, as discussed supra, the extra space in the utility bill envelope is analogous to a broadcast frequency because it is a limited or scarce resource, with economic value, for the dissemination of ideas. As this Court recently reiterated in FCC v. League of Women Voters, 104 S.Ct. 3106, 3116 (1984), broadcasting is treated differently from the print media because of the scarcity of broadcast frequencies relative to the number of individuals who want to broadcast. The extra space in

the utility bill envelope, which is the equitable property of ratepayers, is due the same constitutional treatment.

To be sure, government may not force those controlling a means of communication to present the views of others where access to that means of communication is unlimited. Such is the case of the print media, as demonstrated in Tornillo. Anyone can start a newspaper or similar print publication. In contrast, government is permitted to require those controlling limited or "scarce" means of communication, such as broadcasting, to provide contrasting viewpoints on controversial issues of public importance. As this Court stated in Red Lion, "there are substantially more individuals who want to broadcast than there are frequencies to

allocate...." 395 U.S. at 388.[10]

The extra space in a bill envelope closely resembles the broadcast spectrum, but not newspapers. Absent the PUC's action, only PG&E was able to take advantage of the extra space in the bill envelope and reach all ratepayers without paying for postage. The extra space is a resource owned by ratepayers, but monopolized by the utility. In a similar manner, the airwaves are owned by the public, but controlled by broadcasters

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[10]This "scarcity" of broadcast frequencies persists. The best indication that demand for broadcast licenses outstrips supply is found in ever escalating prices paid for existing TV and radio stations, which far exceed the fair market value of the stations' physical property and good will. See "The New Bonanza in Broadcasting," Broadcasting Magazine, Apr. 15, 1985, at 43-45. On those rare occasions when new broadcasting allocations are made available, competing applications abound; some 160 were filed for 13 major market TV and radio authorizations. "Nearly 20 Years of Trouble for RKO," Broadcasting Magazine, Oct. 22, 1984, at 40. The FCC received an estimated 32,000 applications for 4,000 newly created low power TV broadcast service licenses. "Low Power Television," Broadcasting Magazine, July 2, 1984, at 81.

who, as a result, must share their frequencies. Thus, Red Lion, not Tornillo, is on point.

III. REQUIRING PG&E TO ALLOW OTHERS TO USE THE EXTRA SPACE IN BILLING ENVELOPES DOES NOT VIOLATE ANY OF ITS CONSTITUTIONAL RIGHTS

PG&E relies heavily on Wooley v. Maynard, 430 U.S. 705 (1977), which held that compelling New Hampshire motorists to display the state's motto, "Live Free or Die," on their license plates violated their First Amendment rights because it forced them to carry a message specified by the state which may be offensive to their religious views. PG&E argues that, under Wooley, it may not be forced to include the views of another entity in the billing envelope. However, PG&E disregards a subsequent case, PruneYard Shopping Center v. Robins, 447 U.S. 75 (1980), which decisively establishes that the circumstances here are entirely

different from those in Wooley.

In PruneYard, this Court ruled that the free speech clause of the California state constitution, interpreted by the California Supreme Court as permitting political solicitation in a privately-owned shopping center, did not violate the shopping center owner's rights under the First and Fourteenth Amendments to the U.S. Constitution. The Court expressly distinguished the case from Wooley because 1) the views of the pamphleteers were not likely to be identified with the views of the owner; 2) the state was not requiring that a specific message be disseminated; and 3) the owner was free to disassociate himself from the views of the speakers. Id. at 85-88. The same factors are present in this case, indeed much more clearly so than in PruneYard.

First, the California PUC has

mandated that TURN shall clearly identify itself as the source of all material inserted into the envelope and state that its contents have been neither reviewed nor endorsed by PG&E or the PUC. See, PUC Motion to Dismiss at A-38. Thus, there is no danger that those reading the material in their bill envelope will misidentify PG&E as the source of TURN's inserts. Second, the PUC has in no way required that a specific message be disseminated. Third, the PUC is not only free to disassociate itself from the TURN statement; it can also include rebuttals and/or notices of disclaimer within the envelope. The Wooley precedent does not apply here for the same reasons, therefore, that it did not apply to the shopping center in PruneYard.

PG&E grievously misinterprets PruneYard in attempting to distinguish it from the facts in this case. As discussed

above, the key difference between PruneYard and Wooley is that the views of pamphleteers would not be misidentified as being those of the shopping center owner, while misidentification of views was clearly a danger associated with the New Hampshire license plate slogan. One factor of several cited in PruneYard which led the Court to distinguish Wooley is that the shopping center owner had chosen to make it open to the public.[11]

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[11]The Court distinguished Wooley, stating:

> Here, by contrast, there are a number of distinguishing factors. Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property ... Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.

Because it was known that the shopping center was open to all, shoppers would not assume that those handing out political information in the center were endorsed by the center's owner.

PG&E argues incorrectly that because it has chosen not to open the bill envelope to the public, PruneYard does not apply. First, the analogy is inapposite because PG&E does not own the extra space in the envelope; it is the equitable property of ratepayers. It is not for PG&E to choose whether the extra space will be open or closed to the public.

Second, the fact in PruneYard that the shopping center was open to the public was, as discussed above, evidence merely that the pamphleteers' views would not be confused with those of the owner. In this case, there is other, and actually

stronger, evidence that misidentification will not occur. Here, the source of the item distributed must be clearly identified.

CONCLUSION

For the reasons stated above, amici respectfully urge that the ruling of the California PUC be upheld by this Court.

Respectfully submitted,

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